IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 473

ILLINOIS COMMERCE COMMISSION, et al., etc., et al.,

Petitioners,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS ILLINOIS COMMERCE COMMISSION AND OTHER OFFICIALS OF THE STATE OF ILLINOIS.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South La Salle Street,
Chicago 4, Illinois,
Attorney for Petitioners.

WILLIAM C. WISES,
Assistant Attorney General,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946,

No. 473

ILLINOIS COMMERCE COMMISSION, et al., etc., et al.,

Petitioners.

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS ILLINOIS COMMERCE COMMISSION AND OTHER OFFICIALS OF THE STATE OF ILLINOIS.

Because the instant petitioners conceive the issues of the case of ILLINOIS COMMERCE COMMISSION, ET AL., ETC., ET AL. V. GREAT LAKES ELEVATOR CORPORATION, ET AL., No. 472, AND ILLINOIS COMMERCE COMMISSION, ET AL., ETC., ET AL. V. BOARD OF TRADE OF THE CITY OF CHICAGO, No. 473, to be so intimately related as to be not susceptible of separate consideration, this single reply brief is filed in both cases.

ARGUMENT.

I.

The questions moqted in these cases are not definitive issues but are abstract and general questions as to the boundaries between state and federal authority over warehouses. Therefore they are not properly susceptible of decision and the cases should be dismissed.

Respondents' briefs make it clear that, as Illinois intimated in her brief in support of her petition for *certiorari,* the plaintiffs do not seek this court's decision upon the validity of any specific or particular regulation or other action of the Illinois Commission. Rather do they importune it to define in abstract and general terms the limits between state and federal power over the vast, intricate and vital business of storing the nation's grain.

A granary, whether or not it is licensed under the Federal Warehousing Act, must comply with many laws of nature if it is to serve the public adequately. It must be proof against thieves and vandals, against rodents, against bacteria, against fire, against extremes of heat and cold, and, especially where it stands upon a wharf, against water seepage. And public policy, whether state or federal, may concern itself with the safety of employees, customers and the public generally. Therefore, the myriad phases and ramifications of the business are by their inherent nature subject in diverse and manifold aspects, to national, state and local regulation.

In addition, so highly sophisticated and integrated an economy as that of our modern industrial and commercial society requires that the warehouseman's receipts, which

are commercial specialties evidencing ownership of the nation's foodstuffs, assure that they will be honored according to their tenor. Among the many important aspects of the grain warehouse business that are and must be subject to regulation either by state or federal authority are rates, physical facilities, financing both by the public and by transactions among affiliates, segregation and commingling of fungible grains, trading on the part of a warehouseman in grain stored in his own warehouse, the location of elevators both in respect to their proximity to water and rail routes and with respect to zoning programs, negotiability and other contractual implications of warehouse receipts, inspection of grains with respect to fitness for consumption and for the purposes of grading, and the liability of warehousemen as bailee or despositary of grains.

From the single phrase in the Federal Warehouse Act (Title 7, U.S.C.A. Secs. 1, *et seq*) providing that the Secretary of Agriculture's power, authority and jurisdiction "shall be exclusive with respect to all persons obtaining a license hereunder," respondents seek to obtain a declaration generally and categorically interdicting all regulation of federally licensed warehousemen by the Illinois Commerce Commission.

Respondents do not contend that federally licensed warehouses are exempt from all state surveillance in respect to such aspects of the business as affect the safety and security of grain stored (respondents concede that fire and health laws may be applied to federally licensed warehouses) nor to regulation of financing in general (respondents do not challenge the validity of Illinois blue sky and other security acts as applied to federally licensed warehouses), nor to many other regulations that embody exertions of Illinois' police power. But if Illinois may exert her police power with respect to public health and safety as against

federally licensed warehouses at all, presumably she may exert that power as well through the mediacy of her Commerce Commission as through the instrumentality of her board of health, her state constabulary and city police departments or other agencies. Although there might well come a point at which federal approbation of a warehouse as proof against deterioration or corruption of its grain, if such approval were direct and specific, might inhibit state inspection, or a point at which federal authority might conflict with and therefore supersede inconsistent state regulation in respect to any one of the other many phases of the warehouse business, this court, we submit, cannot mark and should not attempt to mark such points in this case.

With respect to financing and securities, it is not suggested that Illinois' blue sky laws are rendered impotent to inhibit an issue of stock or bonds to the public generally, even though such stock and bonds represented investment in or ownership of a federally licensed warehouse. Certainly, Illinois' power over her banks would prevent their lending the public's deposited money improvidently, even though the would-be borrower were a federally licensed warehouse.

But respondents say that *in no instance* may Illinois *through her Commerce Commission* regulate *or even scrutinize with a view to regulation* financial transactions equally important to the warehouseman's financial stability and the public's stake in the warehouse if the transactions in question occur between parent and subsidiary or other affiliated corporations.

These reflections show very plainly that what the plaintiff really seek is the vindication of abstract principles of immunity and not the invalidation of any specific or parti-

cular act of Illinois' sovereignty with respect to federally licensed warehouses or the Chicago Board of Trade.

The court is not asked to interdict all state regulation of federally licensed warehouses. And any line by which the court might now undertake to partition the domain of regulatory power between state and nation would have to be a line so broad as to be really not a line at all but no more than a general and therefore a vague indication of the bourne between state and federal authority. It is for this reason, and not merely to preserve the amenities of state and federal comity, that Illinois insists that the present case conceives no definitive issues and is therefore quite premature.

If the considerations above developed are well entertained, it follows that this court should not assume that Illinois will act in derogation of federal authority in respect of matters as to which Illinois has, by respondents' own concession, a very considerable measure of residual sovereignty, notwithstanding the acts in question. If the court accedes to the conclusions suggested under this Point, it will be unnecessary to undertake the task which the plaintiffs' suits seek to visit upon the federal judiciary. The cases may and we think should be dismissed and the respondents remitted to appropriate remedies if future acts of Illinois infringe any immunity conferred by the federal laws in question.

II.

The Johnson Act Is Applicable.

Under the Johnson Act (28 U. S. C. A. Sec. 41 (1)) access to the federal courts is forbidden where it is sought to impeach state regulation that affects rates, does not involve interstate commerce, and is susceptible to attack by plain, speedy and adequate remedy in the state courts.

Respondents say that rates are not involved, presumably because they have not been established. But rates have not been established simply because of the pendency of the instant federal judicial proceedings. It would be an anomaly indeed if plaintiffs might sue to enjoin the fixing of rates, *thereby in effect seeking protection of present rates*, and then say that rates are not involved because the proceedings instituted by the plaintiffs have prevented their change.

Respondents concede (or at least do not and cannot challenge) the proposition that the state courts would be open to them. (See Commission's brief in support of petition for *certiorari*, pp. 13-14, citing *Peoples Gas Co.* v. *Slattery*, 373 Ill. 31, and *Sprague, et al.* v. *Biggs*, 390 Ill. 537.)

The only question remaining, then, is whether "interstate commerce" is "involved." That the business of grain warehouseing affects interstate commerce is not challenged. But nearly all modern industry and *all* modern public utility operations "affect" interstate commerce. If the Johnson Act is not applicable wherever interstate commerce is "affected," the statute is a practical nullity.

That the business, the activities of which are purely local, as manufacture is local even when the product is destined for interstate commerce, does not "involve" interstate commerce clearly appears from *Munn* v. *Illinois*, 94 U.S. 113. In that case, as the court knows, it was sought to invalidate Illinois regulation fixing grain warehousemen's tariffs on the ground, among others, that the business so far constituted or involved interstate commerce as to be beyond the purview of state regulation. It must be remembered that at the time of *Munn* v. *Illinois*, this court adhered sedulously to the doctrine that where interstate commerce was involved, congressional silence with respect to interstate commerce meant that state legislation was inter-

dicted. Yet this court, though recognizing the interstate implications of the business, held that the business did not so far directly constitute or involve interstate commerce as to forbid the exercise of state legislative authority. If this is so, then certainly interstate commerce is not involved.

III.

Neither present federal regulation of warehouses and of boards of trade nor potential (not actual) conflict between such regulation and state regulation ousts the Illinois Commission of jurisdiction.

All of the participants in the present litigation, including all *amici curiae*, concede that congressional intent, expressed or clearly evinced, is the touchstone of this case.

Let us then undertake to visualize the practical operation of the legislation in question, *first*, as conceived by respondents, and, *second*, as conceived by petitioners.

The Intent of Congress and the Operation of the Act As Conceived by Respondents.

According to respondents, Congress, recognizing that the business of storing grain is quite as vital to the very lives of American citizens as is its transportation, undertook to pre-empt the regulation of this business from the states and to substitute comprehensive regulation for state control. How did Congress, according to respondents, go about the important task that it assumed?

First, it plainly provided that no warehouseman need submit himself to the authority of Congress and the Department of Agriculture at all unless he wished to. But if he did elect to substitute national for state authority over himself, he subjected himself to no comprehensive or in-

tegrated rate making process, submitted to no requirement at all in respect to his charges except that they be not exorbitant, obtained no right to judicial review of any rate that he might charge,* escapes state surveillance but does not submit himself to federal superintendence with respect to transactions among affiliated interests, exempts himself from all state regulation but incurs no penalty for violation of federal regulation at any time that he chooses to abandon his license and return to state superintendence and, in short, *finds a zone of sanctuary where neither state nor federal authority can touch him.*

It is very doubtful whether the act, *as thus construed,* is constitutional. Certainly, no such authority over rates as that given to the Department of Agriculture, which is merely authority to approve the rate of each warehouseman individually, could stand as constitutional if in fact it is a rate making power at all.

The Act as Construed by Petitioners.

We believe that we have demonstrated above that the act *as construed by respondents* is so arrantly unreasonable a means of accomplishing the (supposed and alleged) plenary regulation of the warehouse business that it is probably unconstitutional.

But if the act is understood *not* as an exercise of national sovereignty in pre-emption of the field of state regulation, but merely as a means of enabling those warehousemen who

---

* In the Rice brief it is conclusively demonstrated, contrary to the contentions of respondents, that the federal administrative review act was not even passed until thirty years after the adoption of the Federal Warehouse Act, and, moveover, that that act applies only to federal administrative procedures where the act authorizing such procedures affords and requires notice, hearing on evidence, findings, and the like.

so elect to obtain federal credentials for their warehouse receipts, the act immediately becomes understandable, reasonable and eminently sensible.

As we read the act, it means that if a warehouseman desires the prestige, accreditation and sanction of federal approbation of his business, he may submit his business, including his rates of charge, mode of storage and the text and import of the receipts which he issues, to federal supervision. Such voluntary submission to federal authority may and doubtless will give him a competitive advantage over those who do not choose to seek the hallmark of federal approval upon their business. But such advantage is entirely legitimate. His competitors can either obtain a like advantage or have not earned the *signum* of approval implied by federal licensure.

In short, if the act is conceived not as an attempt to pre-exempt without supplanting state legislation, but merely as part of a national policy such as that implict in a federal Bureau of Standards, the act immediately becomes a congressional measure distinguished by its common sense.

Now we say that this is true notwithstanding that the authority of the Secretary of Agriculture shall be "exclusive." *For the Secretary has no authority except the limited authority envisioned by the construction for which we contend.* With respect to those particular matters in which he may act, including, perchance, the disapproval of state action when such action is actually in conflict with the federal act or regulations adopted under it, his authority will be supreme.

Mindful that this court will have already perused hundreds of pages of briefs by the time that it reaches this one, we are anxious to keep the tenor of the instant presentation that of a reply rather than repetition of arguments

already made. We do, however, suggest, even though the suggestion is in some measure repetitive, that *Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148, which the Circuit Court of Appeals said

"On its facts * * * is most similar to the instant one", is not nearly as incisive in its parallel as is *Terminal Ass'n.* v. *Brotherhood of Railway Trainmen,* 318 U.S. 1, where a regulation of the Illinois Commerce Commission commanding petitioner railroad to run cabooses on interstate trains was sustained, although this court recognized that the regulation might conflict with contrary regulation by the Interstate Commerce Commission and although the court also observe that the safety of employees, the protection of the public, and all other public interests sought to be served by the state regulation in question had been the subject matter of direct congressional action.

Respondents find some anomaly in the fact that the Illinois Commission may prescribe a rate which the Secretary of Agriculture may disapprove. The same thing has long been true in the field of railroad rates. Under section 13 of the Transportation Act of 1920, the Interstate Commerce Commission may at any time disapprove and invalidate a rate fixed by a state commission—let us say, for example, a rate for the transportation of grain from one warehouse to another. How, then, can there be any incongruity or solecism in a conception of an intent of Congress that would make rates fixed generally by state administrative process effective until such time as they were disapproved by federal action? We may note, in passing, too, that the Interstate Commerce Commission is authorized to and does "cooperate" with state commissions in the matter of fixing rates for intrastate commerce where interstate commerce will be affected.

IV.

The Commodities Exchange Act does not exempt the Board of Trade from investigation or the incidental regulatory process contemplated by the Commission.

In view of the position taken by the Solicitor General of the United States, we feel that little need be said in specific reply to the arguments on behalf of the Board of Trade.

If we are correct in our construction of the Federal Warehouse Act, the Illinois Commission has authority to investigate and to regulate, to an extent that cannot be measured *ex hypothesi* in the instant case, federally licensed warehouses. Even if this court should sustain the Circuit Court of Appeals in its view that *federally licensed* warehousemen are exempt from the Illinois Commission's authority, Illinois' authority would still be plenary with respect to warehousemen who have *obtained no federal license*. It would seem too plain for argument that if the Commission's regulations (whether in respect to all warehousemen or with respect to only those not federally licensed) are to prescribe the kind of warehouses in which is stored the grain in which trading occurs on the floor of the exchange, the Board of Trade will necessarily be affected. Therefore, far from the Board's being prejudiced, its constitutional rights are scrupulously preserved by permitting it to appear, cross examine witnesses, and introduce its own proof in any hearing which must necessarily affect it.

Usually, when legitimate regulation is contemplated (no one questions Illinois' authority over non-licensed warehouses), the complaint is made that third parties who are vitally affected by the regulation were *not* given an oppor-

tunity to be heard. We find it strange in the extreme that inasmuch as regulation is imminent, at least with respect to non-licensed warehouses, and inasmuch as such regulation must substantially affect the business transacted on the Chicago Board of Trade, the Board should complain that it is given an opportunity to participate in the proceedings contemplating such regulation.

In any event, considerations similar to those developed with respect to the warehousemen are appropriate in the case of the Board of Trade. Surely, there is no warrant for the position that merely because the Board of Trade is federally recognized as a "commodity exchange" its activities with respect to warehousemen (who are not commodity exchanges and many of whom have no federal licenses) are immune from state regulation.

Conclusion.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed.

We think that the judgment should be reversed without decision of the inherently nebulous questions of state *versus* federal control that petitioners seek to propound abstractly and in the absence of specific state action.

But if this court finds justiciable controversy upon the present records, then we think that neither the Federal Warehouse Act nor the Commodity Exchange Act should be held to supersede the authority of the Illinois Commerce Commission in the premises.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 S. LaSalle St., Chicago 4, Illinois,
Attorney for Petitioners.

WILLIAM C. WINES,
Assistant Attorney General.
Of Counsel